effective transmission of a telephone message requires a physical connection between the systems over whose lines the message must travel. If this peculiarity of telephone service be a sufficient reason for distinguishing the carrier cases, the courts might well declare a duty in the first instance to make long-distance connection. But the Indiana case stops short of such a rule; and the principal case itself doubts it. The only logical alternative would seem to be the application of the rule announced in the carrier cases, in the absence of legislative provision similar to the statutes which require connecting carriers to make special arrangements for through traffic.[5]

IDENTIFICATION OF THE *Res* IN CONSTRUCTIVE TRUSTS.—Where funds are given to an agent for a particular purpose, a breach of faith on his part, gives rise to a constructive trust.[1] Equity allows the principal to recover the *res* or its product, so long as it can be identified,[2] and, sometimes aids the *cestui* in sustaining his burden of proof,[3] by means of presumptions. Thus, a deposit of trusts funds to the agent's general bank account, constitutes him a constructive trustee,[4] and, if subsequently, the trustee checks out against this account, a presumption that he was honest and drew out only his own funds arises so as to entitle the *cestui* to a preference. Where the balance in the bank is always greater in amount[5] than, or equal to the trust funds,[6] the court, by means of the presumption of honesty, identifies the fund remaining as the trust fund.[6] Where the balance in the bank is less in amount than the trust fund the presumption attaches to so much as is left,[6] and where the agent draws out approximately the equivalent of the trust fund and buys an article identical with that which he is required to purchase, in the absence of evidence to the contrary, the courts will presume such a purchase to be in execution of the trust, and made with the trust funds.[7] This is simply the converse of the presumption that the agent draws out his personal funds first. If the agent purchases an article different in kind, it cannot be said that he did what he ought to have done.[8] Under such circumstances, his clear duty was to use his personal funds in making the purchase, and the principal is relegated to the presumption that the funds left in the bank are the trust funds.

When the agent dissipates the original fund, and then with his own money purchases an article similar to that which he is requested to buy, it is submitted that no such presumption of honesty can arise. Whenever a trust has been held to attach to the new *res,* the trustee *in fact* gave

[1]Perry, Trusts §§166, 206.

[2]Scott *v.* Surman (1742) Willes 400, 404; Burnham *v.* Barth (1895) 89 Wis. 362; Price *v.* Blakemore (1843) 6 Beav. 507; Thompson's Appeal (1853) 22 Pa. St. 16.

[3]*In re* Mulligan (1902) 116 Fed. 715; Taylor *v.* Plumer (1815) 3 M. & Sel. 562, 568; *In re* Marsh (1902) 116 Fed. 396.

[4]*In re* Hallett's Estate (1879) L. R. 13 Ch. Div. 696, 709.

[5]Lewin, Trusts 317. The principle would be entitled to every portion of the mingled property which the agent could not prove to be his own.

[6]*In re* Kurtz (1903) 125 Fed. 992; *In re* Mulligan *supra; In re* Hallett's Estate *supra.*

[7]Perry *v.* Phelips (1798) 4 Vesey 108; Ferris *v.* Van Vechten (1878) 73 N. Y. 113.

[8]Ferris *v.* Van Vechten *supra.*

notice that he had appropriated the new *res* to the old trust.[9] The court can invoke the presumption that the trustee acted honestly where the *res* still exists, since there is nothing to show that the trustee was dishonest. But where the *res* has been dissipated, the fact established, is, that the trustee was dishonest, which should give rise to no presumption that he intended reparation, and substituted a new *res* for the old. The maxim that equality is equity as between all creditors, can admit of no exception, unless, on equitable principles there exists some equity which entitles the trust creditors to a preference.[10] The equity which gives preference, is the existence of the trust *res* in the hands of the bankrupt, and, where the *res* exists it is equitable to invoke a presumption to protect it. But, where the *res* has been destroyed, it is highly inequitable to resort to a presumption, for the purpose of creating an equity in the shape of a new trust *res*. However, this was done in the recent case of *In re Brown & Co.* (1909) 171 Fed. 254, in which it was held, that, where stock brokers prior to bankruptcy, had converted stock belonging to a customer and bought with his money, and, at the time of bankruptcy had stock of the same kind, though less in amount, and not bought with the proceeds of the conversion, in their possession, the customer was entitled to have the stock delivered to him in preference to other creditors.

It was further argued that such facts present an analogy to the grain elevator cases, in which, if the warehouseman depletes the elevator below the amount due to all depositors, subsequent deposits by him are appropriated to make good the conversion.[11] This analogy, however, is never applied where a trustee mingles trust funds with his own, and checks out against the amount, so that the balance remaining is less than the trust fund. In such a case subsequent deposits are not deemed to belong to the *cestui* so as to make good the deficiency.[12] It is admitted, that equity will recognize the claim of the *cestui* to funds expressly appropriated by the trustee to make up the deficiency in the trust fund.[9] Even in the grain cases the depositor has no right to grain in any elevator but that in which his grain was originally stored, simply because it belongs to the warehouseman, who perhaps, has an unexecuted intention of making good the deficiency out of his own grain.[13] It is only where the subsequent deposit is made in the *identical* elevator, that the grain becomes the depositor's. Such a deposit, however, may from the peculiar nature of the grain business be considered an express appropriation.[14] It is here that the analogy to the grain cases fails, because, there is no course of dealing between client and broker, by virtue of which the mere possession of stock of like kind to that converted, can be considered as an express appropriation to make good the conversion. Stock purchased with the customer's funds is considered to belong at once to the customer, and it is the duty of the broker

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[9]Baker *et al.* v. N. Y. Natl. Bank (1883) 100 N. Y. 31, 34; Taylor v. Plumer *supra*; Harris v. Truman (1881) L. R. 7 Q. B. D. 340; Van Allen v. Amer. Natl. Bank (1873) 52 N. Y., 1, 5; Bloodgood v. Mass. Benefit Life Assoc. (N. Y. 1897) 19 Misc. 460.

[10]Cavin v. Gleason (1887) 105 N. Y. 256, 262.

[11]Sexton & Abbott v. Graham (1880) 53 Ia. 181.

[12]2 Harv. L. Rev. 28, 36; Cavin v. Gleason *supra*.

[13]*Cf.* Wood v. Fales (1855) 24 Pa. St. 246.

[14]6 Amer. L. Rev. 450, 467.

to keep it separate and distinct from his other stocks.[15] If converted, subsequently acquired stock of like kind cannot be held to belong to the customer in the absence of an express declaration by the broker to that effect. The adoption of the rule applied in *In re Brown & Co.* will necessitate its application to every wrongful taking of goods, and will create a new and dangerous exception to the maxim, that, as between all creditors equality is equity.

STATUTE OF LIMITATIONS AND FORECLOSURE OF MORTGAGES.—Although the general principle is well established that any act on the part of a mortgagor which extends the statute of limitations as to the note secured likewise extends the statute as to the mortgage, provided the mortgagor has retained the property unencumbered,[1] a more difficult question is the extension of the statute in cases wherein third parties have acquired rights in the mortgaged property. The courts have agreed on a few general propositions: that the grantee has the right to plead the statute;[2] that the grantee of a mortgagor takes the land subject to the mortgage as it was then extended;[3] and, except in a few states,[4] that the right to foreclose is an action *in personam*,[5] and not *in rem;* but further than this the courts have reached widely different results.

Some jurisdictions have adopted the principle that after third parties have acquired rights in the mortgaged premises, the mortgagor has no further power to affect in any way the extent of the lien with which the land is burdened.[6] In support of this rule, the courts have advanced two theories: first, that after conveyance by the mortgagor the land is chargeable purely as surety for the debt,[7] and consequently beyond the control of the debtor; and, secondly, that upon conveyance a separate and distinct cause of action arises against the grantee,[8] which is therefore uninfluenced by the acts of the original mortgagor. In the jurisdictions which have adopted this reasoning neither the absence of the mortgagor from the state,[9] nor part payments by him on the original debt,[10] will in any way affect the running of the statute as to a prior grantee. In connection with this rule, the limitation has been generally adopted that the mortgagee must be given either actual or constructive notice[11] of the intervention of the rights of the grantee, or the latter will be bound by the acts of the mortgagor. The practical argument in favor of this view is admittedly

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[15]Dos Passos, Stock Brokers and Stock Exchanges 287.

[1]Wood, Limitations (3rd ed.) §230.

[2]Corbey *v.* Rogers (1898) 152 Ind. 169.

[3]Carson *v.* Cochran (1892) 52 Minn. 67; Palmer *v.* Butler (1873) 36 Ia. 576; Lent *v.* Morrill (1864) 25 Cal. 492.

[4]Anderson *v.* Baxter (1871) 4 Ore. 105; Peters *v.* Dunnells (1877) 5 Neb. 460.

[5]Whalley *v.* Eldridge (1877) 24 Minn. 358.

[6]Cooke *v.* Union Trust Co. (1899) 106 Ky. 803; DeVoe *v.* Rundle (1903) 33 Wash. 604.

[7]Wood *v.* Goodfellow (1872) 43 Cal. 185.

[8]Colonial & U. S. Mortgage Co. *v.* N. W. Thresher Co. (1905) 14 N. D. 147; Arthur *v.* Serevne (1893) 39 S. C. 77.

[9]George *v.* Butler (1901) 26 Wash. 456; Bush *v.* White (1884) 85 Mo. 339.

[10]Tate *v.* Hawkins (1884) 81 Ky. 577; California Bank *v.* Brooks (1899) 126 Cal. 198.

[11]Denny *v.* Palmer (1901) 26 Wash. 469; Filipino *v.* Trobock (1901) 134 Cal. 441; Hibernia etc. Society *v.* Farnham (1908) 153 Cal. 578; Paine *v.* Dodds (1905) 14 N. D. 189.